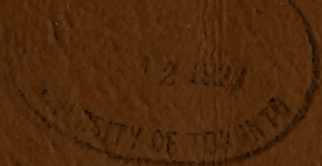




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Arbitration, International

# The English Speaking Peoples and International Disputes

by

The Honorable William Renwick Riddell, LL. D., F.R.S.C., & C.  
Justice of the Supreme Court of Ontario

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A contribution to better International Relations









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(The following article was written at the request of the Kiwanis Club of Buffalo, New York; it is an amplification of an address before the Club, November 9, 1921.)

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There are just two theories of international relationships—

One is the doctrine of the autocrat, "Might makes Right, it is my right and therefore my duty to take all that my might makes me able to take, irrespective of what others may conceive to be their right." This may be perfectly honest, heartfelt and held as a very religion—no one can seriously doubt that the Kaiser really believed that he had been chosen by God Himself for the high and holy duty of subjecting the world to the might of German arms and of carrying into effect what he should decide. And did he not have his legion of professors and theologians,

"To prove by reason, in reason's despite,  
That right is wrong, and wrong is right,  
And white is black and black is white"?

The other adopts the thought of Pallas Athene,  
"Because Right is right, to follow Right  
Were wisdom in the scorn of consequence."

This is the principle of democracy, which insists that the rights of all are to be respected not alone the will of one, which does not admit any privilege given "By the Grace of God"—for of a truth it perceives that God is no respecter of persons.

The English-speaking peoples—I do not like the word "Anglo-Saxon," being neither Angle nor Saxon—the English-speaking peoples have adopted and put in force the latter



theory—while they may recognize the necessity of a large navy, an imposing army, they know that it is not naval strength, not military force, but righteousness that exalteth a nation. In their relations with the rest of the world and especially with each other, the great Republic and the mighty Empire have on the whole been governed by justice as it was given to them to see it.

Not that I would have you think that I contend that neither has ever been wrong—I am no more proud of the Chinese War than some of you of the Mexican War, while neither nation can boast of the foolish, unnecessary, fratricidal war of 1812 which was as destitute of results as of real necessity for its occurrence.

The method of determining international relations by the demands of justice seldom leads to war—disputes will, of course, arise by the nature of things, but these disputes are not at once put to the arbitrament of the sword—they are discussed from every point of view by statesmen and diplomats, and if the parties do not agree, the matters are left to the determination of an independent tribunal. That is the method pursued by the citizens of every civilized country in their relations with each other,—and the degree to which this method is pursued by private citizens is no bad criterion of the civilization of their State.

The longest international boundary in the world, four thousand miles long, stretching from the Atlantic to the Pacific, settled without shedding a drop of blood is a standing tribute to this method and an illustrious example of its magnificent success—for not an inch of it was beyond dispute and every inch might have cost a life.

Beginning at the East, the boundary line between the United States and British Territory is the river St. Croix.

By the Definitive Treaty of Peace made in Paris, 1783, it was agreed by Article 2 that the boundary at that point should be the River St. Croix. There were two Rivers known as the St. Croix, some nine miles apart; the one further west, also called the Schoodiac, Scoudiac or Schoodic was claimed by Canada (really Nova Scotia) as the true St. Croix while the United States, (really Massachusetts), with equal confidence claimed that to the east, the Magaguadavic, as the true boundary under the treaty of Paris.

George Washington sent John Jay, the Chief Justice of the Supreme Court, to London to negotiate and if possible to obtain a settlement of this and other matters in dispute: he was unable to settle this and certain other disputes, but a Treaty, 1794, (Jay's Treaty), was made by which it was in Article V, agreed that the King and the President should each



appoint one Commissioner, they to choose a third (or if they could not agree, a third was to be chosen by lot), and the three Commissioners should determine which river was the St. Croix of the Definitive Treaty.

(1)\* The King (i. e. the British Ministry) selected Thomas Barclay of Annapolis, Nova Scotia, who, born in the Colony of New York, had been a law-pupil of John Jay's, but adhering to the Crown in the Revolution had, when his cause was lost, gone to British territory and become a member and the Speaker of the Legislature Assembly of Nova Scotia. The American Commissioner was David Howell, Judge of the Supreme Court of Rhode Island—he mentioned to Col. David Barclay the name of Egbert Benson for the third Commissioner.

Barclay knew him and accepted him at once as a "cool, sensible and dispassionate third Commissioner." Benson had been judge of the Supreme Court of New York and was afterwards a judge of the Circuit Court of the United States.

These three lawyers made a unanimous award at Providence, R. I., in 1798 in favor of the Schoodiac.

Both these rivers fall into Passamaquoddy Bay which lies at the north east angle of Maine, but as Maine did not separate from Massachusetts until 1820, it was then at the north east angle of Massachusetts. It was at the south west angle of Nova Scotia or of New Brunswick after that Province was formed in 1786. There had been a dispute over some of the islands in this bay—Jay had not settled it and the dispute between Massachusetts and New Brunswick continued until the War of 1812. When the Commissioners at Ghent were settling the terms of peace in 1814, these islands and an island, Grand Manan, in the Bay of Fundy were discussed, and in the treaty of Ghent (1814) it was agreed by article IV to leave the settlement to two Commissioners, to be appointed by the President and the King respectively.

(4) The British Commissioner was again Col. Thomas Barclay; the American Commissioner was John Holmes, a member of the Massachusetts Legislature and afterwards Senator of the United States for Maine when Maine became a separate State in 1820. They made a compromise award at New York, 1817, whereby the Islands Moose, Dudley and Frederick went to the United States and the others to Britain.

\* The figures refer to the number of the arbitration, chronologically in the list of the twenty-one Arbitrations between the two countries.

An even more troublesome question was discussed at Ghent which was not so easily solved.

The Definitive Treaty of Peace by Article II had fixed the international boundary thus—"From the northwest angle of Nova Scotia, viz. that angle which is formed by a line drawn due north from the source of Saint Croix River to the Highlands and along the said Highlands, which divide those rivers which empty themselves into the river St. Lawrence from those which fall into the Atlantic Ocean, to the Northwesternmost head of Connecticut River; thence down along the middle of that river to the 45th degree of north latitude, from thence by a line due west on said latitude until it strikes the river Iroquois or Cataraquy" (which we now call the St. Lawrence).

The true St. Croix was determined under Jay's Treaty (Arbitration No. 1) but where were "the Highlands"?

That question was also agreed by the Treaty of Ghent, Article V, to be left to two Commissioners, one to be appointed by either party.

(5) Col. Thomas Barclay and Cornelius P. Van Ness, afterwards Chief Justice and Governor of Vermont, were appointed but they failed to agree.

The treaty provided that if they failed to agree, a reference should be made to some "friendly sovereign or state." In 1827 a Convention was entered into, under which the dispute was left to arbitration.

(10) William, King of the Netherlands, was chosen as arbitrator; he, in 1831, made his award but it was not satisfactory; and the line was afterwards fixed by diplomatic negotiation by Daniel Webster and Lord Ashburton—it is set out in the Ashburton Treaty of August 9, 1842.

It was hardly to be expected that there would be no dispute as to the islands in what may be called the international waterway. The Definitive Treaty of 1783 had fixed the line thus: "along the middle of said river Iroquois or Cataraquy (i. e. the St. Lawrence above Montreal) into Lake Ontario, through the middle of said Lake until it strikes the communication by water between that Lake and Lake Erie, etc." i. e. along the middle of the Great Lakes and rivers. There were islands in the St. Lawrence, the Detroit and St. Mary's Rivers, and disputes arose concerning where the true line of the middle of the rivers ran. This was left to arbitration, also, by the Treaty of Ghent (1814) Article VI.



(6) John Ogilvie of Montreal was the first British Commissioner. He died of fever caught in the swamps near Amherstburg (in reality killed by mosquitoes) and he was succeeded by Anthony Barclay, son of Col. Thomas Barclay, so often named. The American Commissioner was General Peter Buel Porter of Niagara County, New York State, who had played a creditable part in the war of 1812 and who was in 1828 to become Secretary for War in John Quincy Adams' Cabinet. They made an award at Utica in 1822 which has been carried into effect.

The boundary from Lake Superior to the Northwestern point of the Lake of the Woods was fixed by the Definitive Treaty of 1783, Article II, but the Treaty went on to say that the international boundary should run due west from that north western point of the Lake of the Woods to the river Mississippi. Geography made a laughing stock of diplomacy for no Mississippi could be found west of this point. In 1818, a Convention was entered into whereby a line was to be run due north and south from the northwestern point of the Lake of the Woods to the 49th parallel and that line and the 49th parallel were to be the international boundary "from the Lake of the Woods to the Stony Mountains." West of the Stony (or Rocky) Mountains no line was fixed: disputes had already arisen. Britain claimed south as far as the mouth of the Columbia River between 46 and 47 degrees, N. L., while the United States claimed as far north as 54 degrees, 40 minutes. The Convention of 1818 by Article III left the country "Westward of the Stony Mountains" open to the citizens of both countries for ten years. Attempts were made in 1823 and 1826 to settle the line, but in vain, and a Convention in 1827 extended the ten years indefinitely. The election of James Knox Polk was materially assisted by the slogan "Fifty-four Forty or Fight." He was elected but there was neither fifty-four, nor fight, for a Treaty was entered into in 1846 fixing the line "along the 49th parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island and thence southerly through the middle of the said channel and of Fuca's Straits to the Pacific Ocean." (Article I)

One would think that now all difficulty was over; but Geography again played havoc with Treaty. There turned out to be no less than three channels, any one of which might be called "the channel which separates the continent from Vancouver's Island," Rosario (or Vancouver) Douglas and DeHaro. The United States claimed that furthest west, De Haro, Britain claimed that furthest east, Rosario, and none so poor spirited as to claim the middle channel, Douglas.

In 1869 a Convention was entered into to refer the dispute to the President of Switzerland, but the Senate of the United States refused to ratify the Convention. American troops were landed by General Harney on the Island of San Juan, British Ships of war cleared for action and war was terribly near. It might have been precipitated by one fool. But the common sense and forbearance of both peoples brought about an arrangement for joint occupation until the title was decided.

(17) In 1871 by the Washington Treaty, Articles XXXIV—XLII, the dispute was referred to William I, Emperor of Germany; and he, in 1872, made an award in favor of the American contention.

Thus the last inch of the old boundary line was fixed: but in the meantime another complication had arisen. In 1867, the United States acquired Alaska from Russia and thus another boundary was brought into existence to be cared for. In 1892 a Convention was entered into for a joint survey, but surveyors and engineers do not settle disputed boundaries unless they have some description or instructions to go by. In 1903, a Convention was entered into to submit the matter to "six impartial jurists of repute." On the one side were named Lord Alverstone, Lord Chief Justice of England, Sir Louis A. Jetté, formerly Chief Justice of Quebec, and John Douglas Armour, Justice of the Supreme Court of Canada, and formerly Chief Justice of Ontario. Mr. Justice Armour dying, his place was filled by Mr. (afterward Sir) Allan Bristol Aylesworth, K. C. The American Commissioners were Elihu Root, (Senator) Henry Cabot Lodge of Massachusetts and George Turner of Washington. President Roosevelt asked Joseph H. Choate, the American Ambassador, to act as chief counsel but Choate refused. A majority award, the Canadians dissenting, was given in London in 1903 and the last scrap of international boundary was fixed. Canadians believed and still believe that the cards were stacked against them, but there never was even a suggestion that the arbitrators' award should be repudiated. A bargain is a bargain and a treaty is not "a scrap of paper."

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Reviewing the course of settlement from the east we find arbitration by two, by three—diplomacy after failure of arbitration by three and by one—arbitration by two, diplomacy, arbitration by one and finally by six—a variety of means all legitimate, peaceful and righteous—Plus ça change, plus c'est la même chose: not a drop of blood, not the tear of a widow, the wail of an orphan.



Next after territory come rights of one party in territory owned or claimed by the other.

By the Definitive Treaty of Peace (1783), Article III, "the people of the United States" were to have certain fishing rights on the Grand Bank, in the "Gulph" of St. Lawrence and "coasts, bays and creeks," of British Dominions; the War of 1812 was claimed by Britain and denied by the United States to have put an end to these rights—in 1818, a Convention was entered into whereby the United States renounced all fishing rights within three miles of British territory (except the Magdalen Islands, Labrador and part of Newfoundland). When the Reciprocity Treaty was agreed to in 1854, it contained an Article I, by which Americans received during the currency of the Treaty, the "liberty" given up by the Convention of 1818. A joint commission was agreed to determine where the Americans might fish.

(12) The British Commissioner was M. H. Perley, the American G. G. Cushman of Maine. John Hamilton Gray of New Brunswick was selected as the third by lot. Cushman resigned and was succeeded by Benjamin Wiggin, then by John Hubbard and finally E. L. Hamlin. Perley died and was succeeded by Joseph Howe of Nova Scotia. The award was not wholly satisfactory but both parties observed it.

The Reciprocity Treaty was abrogated by the United States in 1866, and consequently Americans were remanded to the Convention in 1818.

The Treaty of Washington of 1871 by Article XVIII restored the lost rights in consideration of certain rights given British Subjects by Articles XIX and XX: it was contended that the advantage given the Americans was greater than that given the British.

A Commission was agreed to by Articles XXII and XXIII to determine the amount to be paid by the United States.

(16) Sir Alexander Tulloch Galt who had been Finance Minister of Canada was appointed by the Queen, John H. Clifford by the President, and M. Maurice Delfosse, the Belgian Ambassador at Washington by Queen and President jointly—on the death of Mr. Clifford, Ensign Kellogg was appointed by the President. They met at Halifax and in 1877 they made a majority award (Kellogg dissenting) of \$5,500,000 against the United States.

Even this did not put an end to the troubles over fishing: the Convention of 1818 was not too clearly worded—at least not so clearly worded as that fishermen could not find a doubt in it. American fishermen continued fishing in places and by

methods considered by Canadians not justified by the Convention. There was constant friction, and many fruitless attempts at settlement were made. At length in 1908 it was agreed to have the dispute decided by a tribunal selected from the Permanent Court at the Hague.

(21) There were selected Hon. George Gray of the U. S. Circuit Court of Appeals, Sir Charles Fitzpatrick, Chief Justice of Canada, Dr. H. Lammasch, Aulic Counsellor and of the University of Vienna, Jonkheer A. F. De Savornin Lohman of the Netherlands and Dr. Luis Maria Drago of the Argentine Republic. They met at the Hague in 1910 and made an award unanimous in all but one point—in that Dr. Drago gave effect to a contention on the part of the United States which Judge Gray considered untenable.

Seals come after fish.

Before the sale of Alaska to the United States, Russia had asserted rights of ownership in the Behring Sea which both the United States and Britain denied. When Alaska became American, Congress passed legislation which was considered to prohibit the killing of fur seals in the Sea. The United States claimed the ownership of the Sea as a "mare clausum" although its mouth was 450 miles wide. Canadian sealers were seized by American cruisers 60 miles from land in the open sea. Some of the crew were imprisoned, some cast adrift at San Francisco. Not much more has often caused a long weary war; but the two English speaking peoples solve such matters otherwise. In 1892, a Treaty was made which, Article I, referred the "jurisdictional rights of the United States in the waters of Behring Sea" to seven arbitrators.

(18) Lord Hannen, Lord of Appeal in Ordinary, and Sir John S. D. Thompson, Minister of Justice of Canada, were appointed by the Queen; John M. Harlan, Justice of the Supreme Court of the United States and Senator John T. Morgan of Alabama by the President; Baron Alphonse de Courcel, a Senator of France, by the President of France; Marquis Emilio Visconti Venosta, a Senator of Italy by the King of Italy, and Gregers Gram, a Minister of State by the King of Norway and Sweden.

They met at Paris under the presidency of de Courcel and in 1893 made a unanimous award substantially sustaining the British contention.

Then came the question of compensation to be paid to the wronged Canadian sealers.



(19) This by a Convention entered into in 1896 was left to George Edwin King, a Justice of the Supreme Court of Canada and William L. Putnam a Judge of the United States Court of Appeals. These two eminent Judges did not need to call in the assistance of an Umpire but agreed (1897) on a sum of \$473,151.26, which was promptly paid by the United States.

\* \* \* \* \*

It was not territory and territorial right alone which caused trouble—personal property was sometimes a matter of dispute.

And first as to Slaves.

When after the Revolutionary War, the British Troops left the territory of the United States, they took with them hundreds of persons who had been slaves. The Treaty of Peace, Article VII, provides that the withdrawal should be "without carrying away any negroes or other property of the American inhabitants." Washington over and over again demanded the return of the negroes taken away or their value—Washington was himself a slave owner—and as often the demand was refused, Britain claiming that when slaves fled to the British garrisons for safety, they became free and ceased to be "property" of the American inhabitants. Jay failed to obtain compensation for these negroes and they never were paid for.

During the War of 1812, many American slaves entered the British lines, many induced to do so by a Proclamation of Admiral Cochrane in effect promising them freedom. The Treaty of Ghent (1814) provided, Article I, that there should be no "carrying away of any slaves or other private property." Britain set up the same contention as before, that is, that the slaves had ceased to be slaves, and refused to send them back to a life of horror and despair. The United States insisted; and in 1818 a Convention agreed to leave the question to some friendly sovereign or State.

(7) The greatest expert in slaves, having more than any other Sovereign, the Emperor of Russia, was chosen and he decided, 1822, that the negroes must be handed back or paid for. Britain would not betray the trust of the unfortunates and she had to pay.

Therefore, a Convention was entered into, 1822, to determine the amount to be paid.

(8) First a Commission of one Commissioner and one Arbitrator on each side was to determine the average value of the slaves. The British Commissioner was Sir George Jackson,

an experienced diplomat, the arbitrator was John McTavish; the American Commissioner and Arbitrator were Langdon Cheves who had been Speaker of the House of Representatives and a Judge of the Supreme Court of South Carolina and Henry Seawell, Judge of the Superior Court of North Carolina. These four, 1824, agreed that the average value of slaves taken from Louisiana was \$580, from Alabama, Georgia and South Carolina \$390, from Virginia, Maryland and other States \$280. Then the number from each State had to be decided by the two Commissioners who were authorized to choose one of the arbitrators by lot in case of disagreement.

(9) The two Commissioners disagreed, considerable diplomatic correspondence took place and finally in 1826, Britain paid \$1,204,960 in full satisfaction of the American claim for slaves.

Claims not unlike that just mentioned were made for illegal seizures of American Slavers and other vessels by the British; these and also certain claims by the British for seizure of British vessels before the declaration of War in 1812, arrest of British Subjects, etc. were the subject of considerable correspondence between the two Governments sometimes approaching acrimony. In 1853 all these claims were agreed by a Convention to be left to arbitration.

(11) The Queen appointed Edmund (afterward Sir Edmund) Hornby, a barrister of some note and later Judge of the Consular Court at Constantinople and still later Judge of the (British) Supreme Court of China and Japan. The President appointed Nathaniel G. Upham, sometime Judge of the Supreme Court of New Hampshire. These two tried to induce Martin Van Buren, former President of the United States, to act as Umpire but he declined and they selected Joshua Bates, an American carrying on business in London as partner in Barings.

The awards in favor of Britain amounted to \$275,000, in favor of the United States \$330,000.

\* \* \* \* \*

When the territory south of the 49th parallel was taken west of the Rocky Mountains by the United States, it was agreed to pay the Hudson Bay Company and the Puget Sound Agricultural Company for their property taken south of 49 degrees North Latitude.

(13) The value was left to the arbitrament of Alexander S. Johnson and Sir John Rose. They chose as Umpire, Benjamin R. Curtis, once of the Supreme Court of the United States. But they had no need of an Umpire's services. They agreed upon \$450,000 to the Hudson's Bay Company and \$200,000 to the Puget Sound Company.



The "Alabama Claims" by the United States for damages due to Confederate Cruisers equipped in British waters during the Civil War were referred by the Washington Treaty of 1871, Article I, to arbitration.

(14) The Queen appointed Sir Alexander J. E. Cockburn, Lord Chief Justice of England; the President, Charles Francis Adams of Boston; the King of Italy, Count Frederic Sclopis a distinguished Judge; the President of Switzerland, M. Jacques Staempfli, thrice President of the Swiss Confederation, and the Emperor of Brazil, Baron (afterwards Viscount) d'Itajuba, a University Professor of Law.

These five met at Geneva and in 1872 awarded the United States \$15,500,000, (the Englishman dissenting).

There were other claims arising during the war, claims by the United States for the St. Albans Raid from Montreal, attacks by Confederates upon Northern vessels in Lake Erie, while Britain claimed for detention of vessels, destruction of property, etc. All these claims the Washington Treaty of 1871 by Article XII referred to a Board.

(15) The Queen appointed Russell Gurney, Recorder of London and Judge of the Sheriff's Court, the President, James Somerville Frazer, formerly Judge of the Supreme Court of Indiana; the Queen and President jointly named Count Louis Conti, Italian Minister at Washington. They disallowed, 1873, all the American claim and awarded \$1,929,819 to Britain.

Now we must go back to Jay's Treaty of 1794.

By the Definitive Treaty of Peace 1783, Article IV, it was "agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted." Some of the States passed legislation preventing British creditors obtaining payment of their accounts and refused to repeal the obnoxious statutes. The United States was still a somewhat loose aggregation of separate States and could not compel the erring States to comply with the Treaty: Britain refused to give up the border posts Michilimackinac, Detroit, Niagara etc., until these debts were provided for. Jay's Treaty, 1794, provided by Article VI that the United States would pay these claims and by Article II Britain would give up the Posts.

(2) Arbitrators were appointed — Thomas Macdonald and Henry Pye Rich by Britain, Thomas Fitzsimmons and Col. James Innes by the United States. They chose by lot the fifth, John Guillemard of London. Innes died and was succeeded by Samuel Sitgreaves. The Board quarreled; the reference was a failure and the Commission was dissolved. By a convention of 1802, the United States paid \$600,000 in full settlement.

American citizens had claims against Britain for illegal seizures under Orders in Council, etc. and these by Jay's Treaty, 1794, were also referred to arbitration.

(3) Dr. John Nichol and Dr. John Anstey well known practitioners at Doctors' Commons were appointed by the King; the President appointed Christopher Gore (the preceptor of Daniel Webster, afterward Governor of Massachusetts and a Senator) and William Pinkney, afterwards Minister to London and Attorney General of the United States. These four selected by lot, Col. John Trumbull, the well known painter, as fifth arbitrator. Dr. Nichol resigned in 1798 and was succeeded by Dr. Maurice Swabey (also of Doctors' Commons). A unanimous award was made in 1804 under which Britain paid \$11,650,000.

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We have reviewed twenty-one instances of references to arbitration, all but four (Nos. 2, 5, 9 and 10) wholly successful—two of the failures, Nos. 5 and 10, were on the troublesome question of the "Northeastern Boundary" and the others, Nos. 2 and 9, were due to faults of temper. All the failures were healed by the peaceful methods of diplomacy—and there was NO WAR.

Can any other nations show such a magnificent record? Settlement of thousands of miles of boundary, fishing and sealing rights, payment for slaves, for illegal seizure and detention, for everything which usually leads to war.

These nations have kept the peace for more than a hundred years and intend to keep it for a hundred hundred.

In 1817 by a simple Convention they agreed that the international waters shall not be polluted by the keel of a man of war; their far flung boundary has not a fort, not a soldier. An American is at home in Canada, a Canadian in the United States. We refuse to call ourselves aliens or strangers in the home of our brother.

It was to be thought that the example of two such nations might well be followed by all the world—two nations so strong that they need fear no foe, with a chastity of honor which feels a stain like a wound. What nation so proud, so strong, so great as should scorn to follow their illustrious example?

One tithe of the reasonableness, of the sense of justice, of the righteousness, of these our nations, would have saved the world the awful carnage, the appalling waste of the World War.

It is to be hoped that all nations may absorb the same spirit. But be that as it may, one thing is certain—these nations with kindred aspirations, kindred institutions, kindred



souls, must needs forever stand together, march together and if it must be, fight together for peace and liberty and righteousness.

There may be no written bond, no treaty on paper or parchment but our two great peoples are in all but external form one great union for the salvation of the world. That union remaining intact, civilization is secure; that union broken, woe unutterable.

It is to that Union that I am wont to apply the words of the American poet:

Sail on, O Union, strong and great,  
Humanity with all its fears  
With all its hopes of future years  
Is hanging breathless on thy fate.  
Sail on nor fear to breast the sea  
Our hearts, our hopes are all with thee.  
Our hearts, our hopes, our prayers, our tears  
Our faith triumphant o'er our fears  
Are all with thee, are all with thee.

William Renwick Riddell.







